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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 716

HERMAN FRANCIS HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 717

WILLIAM EDWARDS WILDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 718

RICHARD H. SHUFFLEBARGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 719

CHARLES FRANTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 5-14) [1] is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 27, 1950 (R. 14-17). The peti-

[1] Petitioners were tried separately, but their appeals were consolidated. The designation "R." herein will be used to refer to the joint record of the proceedings in the Court of

tion for writs of certiorari was filed on March 29, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the requirement of the Selective Service Act of 1948 that every male resident of the United States between the ages of 18 and 26 "present himself for and submit to registration" is unconstitutional as an unwarranted restriction upon freedom of religion if construed as applying to persons conscientiously opposed to participation in war and preparation therefor.

2. Whether a belief that a conscription law is morally wrong or a purpose to secure a judicial test of its validity is a good defense to a charge of violation of the law.

3. Whether the registration requirements of the Act are fulfilled by one who notifies his draft board by letter that he does not intend to register, but who refrains from personally appearing before the board.

STATUTES AND REGULATIONS INVOLVED

The Selective Service Act of June 24, 1948 (62 Stat. 604; 50 U. S. C. App., Supp. II, 451 et seq.), provides in pertinent part:

* * * * *

Sec. 3 [50 U.S.C. App., Supp. II, 453] Ex-

Appeals. The trial records, in four separate volumes, will be referred to by the designations "Henderson R.", "Wildman R.", etc.

cept as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 6 (j) [50 U.S.C. App., Supp. II, 456 (j)]. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. * * *

* * * * *

Sec. 12 (a) [50 U.S.C. App., Supp. II, 462 (a)]. Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of

> the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *
>
> * * * * *

The pertinent provisions of the Selective Service Regulations (32 C.F.R., 1949 ed., chap. XVI) are as follows:

> § 1613.11 *Interview of the registrant.* (a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.
>
> * * * * *
>
> (c) The registrar shall ask the registrant for

the information necessary to complete the entries on lines 1 to 15, inclusive, of the Registration Card (SSS Form No. 1), and shall enter such information on the proper lines of the card. * * *

* * * * *

§ 1613.13 *Registrant's signature.* * * *

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of ———————— made in my
(Name of registrant)
presence" and shall sign his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

STATEMENT

In March 1949, each of the petitioners was charged in the District Court for the Southern District of Indiana with knowingly and wilfully failing

and refusing to "present himself for and submit to registration" before a duly authorized registration official or local Selective Service Board, in violation of Sections 3 and 12(a) of the Selective Service Act of 1948, *supra*. pp. 2-4 (Henderson R. 3; Wildman R. 1-2; Shufflebarger R. 1-2; Frantz R. 1-2).[2] Following trials by jury, petitioners Henderson, Wildman, and Frantz were found guilty (Henderson R. 60; Wildman R. 49; Frantz R. 52). Petitioner Shufflebarger waived a jury trial (Shufflebarger R. 4) and was found guilty by the court (*id.* 22). Each petitioner was sentenced to 90 days' imprisonment and to pay a fine of $100 (Henderson R. 73; Wildman R. 58-59; Shufflebarger R. 31-32; Frantz R. 60-61). Petitioners' appeals to the Court of Appeals for the Seventh Circuit were consolidated (R. 6) and the judgments of conviction were affirmed (R. 14-17).

The evidence in all four cases is undisputed. Three of the petitioners are members of the Society of Friends, sometimes called Quakers (Henderson R. 14-15; Wildman R. 13; Frantz R. 13); the fourth belongs to no religious sect (Shufflebarger R. 11). All profess to believe, on moral and religious grounds, that war is never justified; that conscription, being part of the process of preparing for war, is equally wrong; and that registration under a draft law, being the first step in the process of

[2] Wildman, Shufflebarger, and Frantz were indicted. Henderson, having waived prosecution by indictment (Henderson R. 4), was proceeded against by information.

conscription, is likewise morally unjustifiable (Henderson R. 61; Wildman R. 50-52; Shufflebarger R. 24; Frantz R. 54-56). At about the time he was required to register under the Selective Service Act of 1948 and the Presidential Proclamation[3] fixing dates for registering according to age groups, each petitioner wrote his draft board a letter outlining his religious objections to registration and advising the board that, because of those objections, he refused to register (*ibid.*). None of the petitioners registered on the day appointed or at any time thereafter (Henderson R. 62; Wildman R. 52-53; Shufflerbarger R. 25; Frantz R. 8-9).

ARGUMENT

1. Petitioners' principal contention is that the requirement of the Selective Service Act of 1948 that every male resident of the United States between the ages of 18 and 26 "present himself for and submit to registration" is unconstitutional as an unwarranted restriction upon freedom of religion if construed as applying to persons conscientiously opposed to participation in war and preparation therefor (Pet. 5, 9-10, 13-14, 18-19). The contention has the support, as remarked by the Court of Appeals, of "neither reason, nor authority" (R. 9).

The contention presumes that the constitutional proscription of any law abridging the free exercise of religion is absolute and unqualified; that it must

[3] Proclamation No. 2799, issued July 20, 1948, 13 F. R. 4173.

be read *in vacuo;* and that all other provisions of the Constitution are subordinated to it. But, as pointed out by the Court of Appeals (R. 9), the same Constitution which guarantees freedom of religion also gives Congress the power to "raise and support Armies," to "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Art. I, Sec. 8). And, obviously, as the Court of Appeals further observed (R. 9), "To raise an army Congress must necessarily have the power to take an inventory of and to classify the available manpower of the nation. *This is all that registration under the Act actually amounted to, so far as these defendants were concerned"* [Italics supplied].

The question involved here is not whether Congress could constitutionally compel military service by conscientious objectors to warfare in any form, for Congress has never sought to do so. Section 6(j) of the present Act, *supra,* p. 3, specifically exempts conscientious objectors from combatant service, and, indeed, even from noncombatant service if the conscientious objection extends to that type of service as well. But petitioners refused even to register—to be enrolled for classification purposes under the Act. Clearly, nothing in the First Amendment restrains Congress from imposing that requirement. *Warren* v. *United States,* 177 F. 2d 596, 598-599 (C.A. 10),

certiorari denied, 338 U.S. 947; *Baxley* v. *United States*, 134 F. 2d 937, 938 (C.A. 4); *Richter* v. *United States* (C.A. 9), not yet reported, decided April 5, 1950; cf. *Selective Draft Law Cases*, 245 U.S. 366; *Board of Education* v. *Barnette*, 319 U.S. 624, 642, n. 19; see also *Reynolds* v. *United States*, 98 U.S. 145.

It is urged, however (Pet. 10-12), that if religious liberty can ever be restricted by the requirement of registration in a program of military conscription, it can be done only where a "clear and present danger" warrants the restriction. But, as remarked by the Court of Appeals (R. 13), it is "evident that the need for raising an army must be a question to be left to the final decision of Congress." And Congress has declared, in Section 1(b) of the Act (50 U.S.C. App., Supp. II, 451(b)), that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." This legislative judgment, "encased in the armor wrought by prior legislative deliberation," has always been recognized as carrying great weight in the application of the "clear and present danger" doctrine. *Bridges* v. *California*, 314 U.S. 252, 261; *Whitney* v. *California*, 274 U.S. 357; *Gitlow* v. *New York*, 268 U.S. 652.[4]

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[4] Petitioners' suggestion that Congress lacks the power to enact a conscription law "in time of peace" (Pet. 15) is based on an erroneous premise (see *Ludecke* v. *Watkins*, 335 U.S. 160), and is in any event plainly unsound. Congress' constitutional power to "raise and support Armies," to "provide and maintain a Navy" (Art. I, Sec. 8), and to "provide for

2. Petitioners argue (Pet. 5, 7-9, 12) that, even though they deliberately refused to register as required, their belief that conscription is morally wrong and their purpose to secure a judicial test of the Act's validity negative the element of criminal intent indispensable to valid convictions. The Court of Appeals thought the argument "scarcely deserv[ed] * * * consideration" (R. 13), and we agree. Concededly, each petitioner deliberately refused to register, well knowing he was required to do so under the Act. This, plainly, was all the "criminal intent" that was required. *Prince* v. *Massachusetts,* 321 U.S. 158, 166-167; *Browder* v. *United States,* 312 U.S. 335, 341-342; *Sinclair* v. *United States,* 279 U.S. 263, 299; *Davis* v. *Beason,* 133 U.S. 333; *Reynolds* v. *United States,* 98 U.S. 145; *Warren* v. *United States,* 177 F. 2d 596, 600 (C.A. 10), certiorari denied, 338 U.S. 947. Petitioners' reliance on *Keegan* v. *United States,* 325 U.S. 478 (Pet. 12) is misplaced. The inapplicability of the *Keegan* case to the present contention is fully discussed in our brief in opposition to certiorari in the

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the common defence" (Preamble) is not limited to the time of actual hostilities. As the court below remarked (R. 8), "If, as contended by defendants, Congress could only exercise this power to conscript and train men when the country is at war, such action might then be unavailing because it would come too late." The validity of the 1940 Selective Service Act, passed when this country was at peace, has never been questioned (see *Falbo* v. *United States,* 320 U.S. 549, 551-552, and cases cited at R. 8). And see *Warren* v. *United States,* 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947, upholding the validity of the present Act as against this very contention.

Warren case, *supra* (No. 468, Oct. Term, 1949, pp. 10-13), to which we respectfully refer the Court.

3. Finally, petitioners contend (Pet. 14-15) that they in fact complied with the registration requirements of the Act by writing to their draft boards announcing their refusals to register. This unusual argument seems to be based on §§ 1613.11 and 1613.13 of the Regulations, *supra*, pp. 4-5, which provide that "All persons who present themselves for registration shall be registered on a Registration Card"; that the registrar shall fill out the card from information supplied by the registrant; and that the "registrant shall then sign his name" in the appropriate space on the card; but that "If the registrant is unable *or refuses* to sign the Registration Card * * *, the registrar shall sign such registrant's name * * *, and the act of the registrar is so doing shall have the same force and effect as if such registrant had signed the Registration Card * * *, *and such registrant shall thereby be registered*" [Italics supplied]. But petitioners were not convicted of refusing to sign registration cards; they were convicted of refusing to "present [themselves] for and submit to registration" (*supra*, p. 6). The regulations manifestly contemplate the personal appearance before the local board, of each person subject to the Act's requirements, to be registered. Petitioners made no such appearances. *United States* v. *Norton*, 179 F. 2d 527 (C.A. 2), on which petitioners rely

(Pet. 15), is therefore plainly distinguishable. Petitioners' writing of letters to the draft boards, notifying the boards of their intention to refuse to register, plainly did not constitute compliance with the duty, imposed by the Act (Section 3, *supra*, pp. 2-3), to "present [themselves] for and submit to registration."

CONCLUSION

The judgments below are correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

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